U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: - Atlanta Date: MAY 10 1996

In re:

IN EXCLUSION PROCEEDINGS

APPEAL

INDEX

ON BEHALF OF APPLICANT: Michael Feldenkrais, Esquire
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ON BEHALF OF SERVICE: Keith E. Hunsucker
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EXCLUDABLE: Sec. 212(a)(7)(A)(i)(1), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(1) - No valid immigrant visa

APPLICATION: Asylum, withholding of deportation

In a decision dated March 30, 1995, the Immigration Judge found the applicant excludable under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien attempting to enter the United States without a valid immigrant visa. The Immigration Judge also denied the applicant's request for asylum and withholding of exclusion and deportation pursuant to sections 208(a) and 243(h) of the Act, 8 U.S.C. §§ 1158(a) and 1253(h) and ordered him excluded and deported from the United States. The applicant has appealed the Immigration Judge's denial of his applications for asylum and withholding of exclusion and deportation. The appeal will be sustained.

I. BACKGROUND

The applicant is a 21-year-old native and citizen of Rwanda. He attempted to enter the United States on May 14, 1994, but was placed in exclusion proceedings due to his lack of a valid immigrant visa. At his exclusion hearing held on December 21, 1994, he conceded excludability as charged and requested asylum and withholding of exclusion and deportation. In his Request for Asylum in the United States (Form I-589), he claimed that he had been persecuted in Rwanda on account of his race, his membership in a particular social group, and his political opinion. At the hearing held on March 10, 1995, he also said that he had been persecuted on account of his religion.

A member of the Watutsi ("Tutsi") tribe, the applicant testified that he was harassed and subjected to other forms of discrimination in school due to his ethnicity. He also claimed that his sister was killed by government soldiers in 1989 because she was a Tutsi. His family finally fled to Tanzania to escape the widespread massacre of the Tutsis by the Hutus.

In addition to the above, the applicant said that he was beaten by police due to his participation in an anti-government demonstration advocating democracy and unification with Uganda. He also stated that he had problems with the teachers at his school because he was a Jehovah's Witness. He asserted that the Rwandan government "doesn't like" Jehovah's Witnesses (Tr. at 114) and that the owner of the store where his father used to buy tobacco refused to sell to his father once he became a member of that religion.

Finally, the applicant said that he was forcibly recruited by the Rwandan Patriotic Front (RPF), the Tutsi resistance movement, in 1994. He testified that he deserted after 4 to 8 weeks because he could not kill people. He stated that he is afraid to return to Rwanda because the RPF will find him and kill him as punishment for desertion. He also claimed to fear persecution at the hands of the Hutus if he returns to his native country. He said that the Hutus have massacred the Tutsis throughout Rwanda on account of their ethnic background and that he could become a victim of this violence if he is forced to return.

At his hearing on March 30, 1995, the applicant attempted to introduce numerous documents describing the current conditions in Rwanda to demonstrate that his fear of persecution was well-founded. Since he had failed to submit these documents to all parties 10 days prior to the hearing as required by court rules, the Immigration Judge refused to make them part of the record. She claimed it would be unfair to the Service to admit documents which the general attorney had not had an opportunity to review.

II. THE IMMIGRATION JUDGE'S DECISION

After reviewing the evidence of record, the Immigration Judge concluded that the applicant had failed to establish that he met the definition of refugee set forth in section 101(a)(42) of the Act. She therefore denied his applications for asylum and withholding of exclusion and deportation. In her decision, the Immigration Judge ruled that the applicant's past difficulties in Rwanda, including his forced recruitment into the RPF, the murder of his sister, the police beating, and the discrimination he had experienced due to his ethnicity and his religion, did not constitute persecution under the Act. She also found that the problems he could face upon returning to his native country, including country-wide violence, animosity between tribes, and punishment for desertion, did not qualify as persecution on account of one of the five statutory grounds, although she recognized that his fear of returning to his native country was genuine and well-founded. As for his fear of persecution on account of his religion, she held that the evidence of record did not provide adequate proof that he would suffer such abuse upon returning to his homeland.

III. ARGUMENTS ON APPEAL

On appeal, the applicant claims the Immigration Judge abused her discretion in denying his applications for asylum and withholding of exclusion and deportation. He contends that his experiences in Rwanda clearly qualify as past persecution for the purposes of the Act. He also argues that the Immigration Judge erred in dismissing his claims of future persecution merely because they were based on conditions of civil strife in his native country. While Rwanda is riddled with violence, he says the threats to Rwandan citizens arise from ethnic hatred and should therefore qualify as persecution on account of membership in a particular social group for section 101(a)(42) purposes.

The applicant also claims that the Immigration Judge did not give proper consideration to his case due to her belief that he qualifies for temporary protective status. He alleges that she had decided to deny his application before she even heard his testimony. Moreover, he contends that she abused her discretion in refusing to admit his documentation regarding current conditions in Rwanda, particularly since he offered a legitimate reason for failing to present this evidence 10 days before the hearing as required by court rules. Finally, he suggests that the Immigration Judge's decision could have been the result of racial bias and asks the Board to investigate this possibility.

The Service general attorney, on the other hand, contends that the Immigration Judge's decision was proper in light of applicable case law. Moreover, he argues that the applicant's testimony regarding several incidents was not credible. Finally, he claims that the applicant's allegations of judicial misconduct are improper and that the Immigration Judge was correct in excluding the applicant's evidence since it was not introduced in accordance with well-established court rules.

IV. ANALYSIS

In proceedings involving applications for asylum and withholding of exclusion and deportation under sections 208 and 243(h) of the Act, the burden is on the applicant to demonstrate that he is statutorily eligible for each form of relief. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. §§ 208.13(a), 208.16(b). To be eligible for asylum under section 208 of the Act, an alien must meet the definition of refugee set forth in section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) and demonstrate that he merits such relief as a matter of discretion. To be eligible for withholding of exclusion and deportation to a particular country pursuant to section 243(h) of the Act, an alien must show that there is a clear probability that he will face

persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion if he is deported to that country. INS v. Stevic, 467 U.S. 407 (1984). The burden of proof required to establish eligibility for withholding of exclusion and deportation is higher than that required for asylum. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

A. Applicant's Statutory Eligibility for Asylum

An applicant qualifies as a refugee under section 101(a)(42)(A) of the Act if he demonstrates that he has experienced persecution or has a well-founded fear of persecution in his home country on account of his race, religion, nationality, membership in a particular social group, or political opinion. A fear of persecution is considered to be well-founded under this section if it is genuine and if a reasonable person in the applicant's circumstances would fear persecution. INS v. Cardoza-Fonseca, 480 U.S. 421, 430-431 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

In the present case, the applicant claims to fear persecution upon return to his native country for a variety of reasons. We find it unnecessary to address most of these concerns, however, because we believe his fear of persecution at the hands of the Hutus is well-founded and provides a more than adequate basis for a grant of relief. We will therefore confine our analysis of his asylum claim solely to this issue.

From the outset, we note that we have no doubts regarding the applicant's credibility. While the Immigration Judge mentioned a few inconsistencies in his testimony, she did not make an adverse credibility finding (I.J. at 6). The Service has argued on appeal that we should do so, but the inconsistencies that it has cited in its brief are minor and do not go to the heart of his claim. See Service Brief on Appeal at 4. We therefore find no reason to question the reliability of the applicant's story.

The applicant's primary justification for his fear of persecution at the hands of the Hutus is his belief that the Hutus are killing Tutsis throughout Rwanda due to their ethnic background. While the applicant did not refer to it as such, this claim is essentially an allegation that there is a pattern and practice of persecution of the Tutsis in Rwanda on account of their membership in a particular social group. See 8 C.F.R. § 208.13(b)(2)(i). We believe the applicant's testimony and the advisory opinions from the Department of State confirm that this is indeed the case. Id.

At his hearing, the applicant said that, while he was in Rwanda, he was in constant fear that members of the Hutu majority would kill him simply because he was a Tutsi. He claimed that this fear arose from personal experiences and incidents he had observed over the course of the last 6 years.

According to the applicant, the situation of the Tutsis in his part of the country began to worsen in 1989 when the Hutu militia started conducting maneuvers in the area. He said the militia entered this predominantly Tutsi region on the pretext that they were disposing of old ammunition, but he thought their main goal was to intimidate the Tutsis and force them to leave Rwanda (Tr. at 42). He testified that the Hutus constructed roadblocks, imposed curfews, burned houses, detained Tutsis arbitrarily, and conducted secret killings to further this end. He also claimed that the Hutus mined the area around Rwanda's border with Uganda and Zaire because they knew Tutsis were fleeing the country to join the RPF (Tr. at 41).

While the applicant was not harmed during this campaign of intimidation, his sister was killed by the Hutu militia in 1989 (Tr. at 42). The applicant testified that he was visiting an aunt in Uganda at the time of her death, but he claimed he was certain that his sister's murderers were Hutus because Hutu eyewitnesses had told him about the incident (Tr. at 65). He also said that incidents such as this were "a normal occurrence" in Rwanda (Tr. at 65). 1/

The applicant went on to testify that he was harassed and ostracized at school because he was a Tutsi. He claimed that he was afraid to participate in sports because the Hutu boys would beat him up if he performed well (Tr. at 58). He also said that the Hutu children would taunt him by saying things such as "it is the Hutu who run the country now" (Tr. at 58).

In 1991, the applicant was beaten by Hutu police when they attempted to disperse an anti-government demonstration in which he was participating. The applicant said that he and other Tutsi students had organized the event to campaign for democracy and unification with Uganda (Tr. at 41). While the demonstration was mainly political, the applicant implied that it had an ethnic element as well since it involved Tutsis protesting against the Hutu government of their country. The applicant claimed that the Tutsi students who were arrested at the demonstration were placed in prison and tortured.

1/ We note that, on appeal, the Service has challenged the credibility of the applicant's testimony about this incident because it appears to contradict statements the applicant made in his asylum application. In his application, the applicant implied that he was in Rwanda, not Uganda, when his sister was killed because he said "we were searching for her all night." However, when he was confronted with this discrepancy, he explained that he was referring to his people, his aunt and his uncle, when he used the word "we". We find this explanation to be plausible, and therefore conclude, as the Immigration Judge did, that the applicant's testimony regarding this incident is credible.

The applicant said the tension between the Hutus and the Tutsis reached its peak in 1994 when the Rwandan president was killed in a plane crash. He stated that the Hutus blamed the Tutsis for this incident and began to massacre Tutsis throughout Rwanda. He claimed he saw the mutilated bodies of the victims of these attacks when he followed the RPF into the town of Gisenyi (Tr. at 58). He said he was afraid that he would be killed in the same way if he remained in his country (Tr. at 58).

The applicant went on to testify that he is afraid to return to Rwanda now because the Hutus still want to kill all of the Tutsis (Tr. at 62). He said that his family is currently living in Tanzania because they are afraid they will be killed by the Hutus if they return to Rwanda. According to the applicant, the Hutus look down on the Tutsis and say they are not true Rwandans because they are from North Africa. See Exhibit 3 (Form I-589). He claims the Hutus want to rid Rwanda of the Tutsis because they want their land (Tr. at 59), and they are afraid the Tutsis will seize control of the country again as they did under King Maami Mutura in the 1950's (Tr. at 32-33).

Although the documentation the applicant provided regarding the situation in Rwanda was excluded, we can look to the advisory opinions from the Department of State which were admitted into evidence by the Immigration Judge to confirm the applicant's account of conditions in his native country. The July 1994 opinion states that "the Rwandan Army and radical Hutu militia have killed as many as 200,000 Tutsis and moderate Hutus in the past 2 months." The opinion goes on to state that the United Nations Human Rights Commission has expressed its concern that acts of genocide may have occurred in Rwanda. The report says the media reports from the country "leave little doubt that this is so." The report concludes by stating that "Rwandan civilians remain at grave risk, both Hutus and Tutsis."

The September 1994 opinion paints a similar picture. According to this document, the United Nations High Commissioner for Refugees concluded that "hundreds of thousands were killed [in Rwanda] in systematic massacres that constituted genocide against the Tutsis." In addition, the International Committee of the Red Cross stated that its representatives had never seen "such unmitigated hatred leading to the extermination of a significant part of the civilian population." While the opinion said that a new RPF-dominated government was sworn in in July 1994, it pointed out that "abductions and summary executions have been reported." Moreover, it said that "the administrative organs of the state are virtually non-existent." At the end of the opinion, the State Department concluded that "deep ethnic animosities reflected by the genocide, the panicked exodus to neighboring countries, and the refusal of the vast majority of refugees to return still exist."

We believe the above evidence provides more than adequate proof that the Hutus have and are continuing to engage in organized and systematic persecution of the Tutsi tribe in Rwanda. Moreover, we find that such pervasive persecution unquestionably qualifies as a pattern or practice of persecution for the purposes of 8 C.F.R. § 208.13(b)(2)(i). See Makonnen v. INS, 44 F.3d 1378, 1382 (8th Cir. 1995). According to this provision, an applicant need not demonstrate that he will be singled out for persecution to prove that his fear of returning to his native country is well-founded. He may instead establish that there is a pattern or practice of persecution in his homeland of a particular group of persons who are similarly situated to him and that he is readily identifiable as a member of this group. 8 C.F.R. § 208.13(b)(2)(i); Makonnen v. INS, 44 F.3d 1378 (8th Cir. 1995); Kotasz v. INS, 31 F.3d 847 (9th Cir. 1994). The Board acknowledged this exception to the "singling out" requirement in Matter of Mogharrabi, supra when we recognized that a well-founded fear of persecution may be based on what has happened to others who are similarly situated to the asylum applicant rather than on the applicant's own experiences. See also Matter of Dass, 20 I&N Dec. 120 (BIA 1989) (suggesting that asylum claim may be based on broad allegations regarding general conditions in the alien's native country as long as sufficient background evidence is provided).

In light of the above regulation and case law, we find that the applicant has established that his fear of persecution upon return to Rwanda is well-founded. Not only has he shown that he is a Tutsi, see Exh. 6, but he has also proven that there is a pattern and practice of persecution of this tribe in his native country. In addition, the applicant has proven that the persecution he fears is on account of one of the five statutory grounds, namely his membership in a particular social group. As we noted earlier, the applicant has shown that he is a member of the Tutsi tribe. This tribe clearly constitutes "a particular social group" for the purposes of the Act. See Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985). Members of the tribe possess common, immutable characteristics that they cannot change. Id.; See also Matter of Sanchez and Escobar, 19 I&N Dec. 276, 286 (BIA 1985). For instance, their skin is lighter than that of the Hutus, and they have a speech pattern which is distinct from that of other tribes (Tr. at 57).

Moreover, the evidence clearly demonstrates that members of the Tutsi tribe are being persecuted by the Hutus due to their tribal background or membership in a particular social group. Both advisory opinions from the Department of State cite ethnic hatred as the source of the violence in Rwanda and report that acts of genocide against the Tutsis have occurred in this country. Given this information, one cannot deny that the Hutus' actions are ethnically motivated.

Based on the foregoing, we conclude that the applicant has met his burden of showing that he is statutorily eligible for asylum under section 208(a) of the Act. He has demonstrated that he has a well-founded fear of persecution in Rwanda on account of one of the five statutory grounds and has therefore established that he meets the definition of refugee set forth in section 101(a)(42)(A) of the Act. Section 208(a) states that an applicant who meets this definition is statutorily eligible for asylum.

B. Applicant's Eligibility for Asylum as a Matter of Discretion

In addition to ruling that the applicant is statutorily eligible for asylum, we conclude that he merits this relief as a matter of discretion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987). While he used fraudulent passports in his effort to escape his native country, this fact does not automatically render him ineligible for discretionary relief. Id. at 473. His actions must instead be considered in light of the totality of the circumstances surrounding his flight from Rwanda. Id.

The applicant testified that he could not have gotten travel documents in Rwanda when he left because there was no government at that time (Tr. at 125). Thus, he said that the fraudulent passports provided the only means of escape to the United States (Tr. at 125). Moreover, the record indicates that the applicant only used fraudulent documents to escape the violence in his country and to get to Sweden; he did not attempt to enter the United States through the use of a fraudulent passport. See Matter of Pula, supra, at 474 (holding that the use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor).

The applicant also did not find a safe haven in another country on his way to the United States. While he passed through Uganda, Tunisia, Italy, and Sweden, he did not apply to stay in these countries because he did not speak the language or have any relatives there. He said he only spent two or three days in each place because the Africans he met told him he would be deported to Rwanda if he remained. He said he decided to come to the United States because he has a brother who is a lawful permanent resident of this country.

After weighing these facts, we conclude, in accordance with Matter of Pula, that the applicant is eligible for asylum as a matter of discretion. His use of fraudulent documents does not warrant a denial of relief given the circumstances of his case. We therefore grant his application for asylum pursuant to section 208(a) of the Act.

C. Applicant's Eligibility for Withholding of Exclusion and Deportation

Since we have granted the applicant's application for asylum pursuant to section 208(a) of the Act, we find it unnecessary to address his eligibility for withholding of exclusion and deportation under section 243(h) of the Act. Matter of Mogharrabi, supra. We will therefore make no ruling on this issue.

D. CONCLUSION

Overall, we conclude that the Immigration Judge erred in denying the applicant's asylum application. She mistakenly equated the violence in Rwanda to general civil strife and failed to acknowledge that the massacre of the Tutsis was caused by deep-seated ethnic animosity. Thus, she incorrectly found that this violence could not qualify as persecution on account of the applicant's membership in a particular social group. We will therefore overrule her decision, terminate the exclusion proceedings, and grant the applicant's application for asylum pursuant to section 208(a).

Since we have found the applicant eligible for asylum based on the evidence of record, we will not address his contention that the Immigration Judge improperly excluded his documentary evidence. We will also not honor his request that we investigate the Immigration Judge for discriminatory practices because such an investigation is beyond the scope of our authority. Nevertheless, we must note that we find the applicant's allegation of racial bias to be completely unfounded. There is nothing in the record to support this contention, and the applicant has offered no evidence from other cases to support such a serious charge. We therefore dismiss his claim of bias as frivolous and unwarranted.

ORDER: The appeal is sustained.

FURTHER ORDER: The application for asylum is granted and the exclusion proceedings are terminated.

FOR THE BOARD